

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

BR  
FILED  
AUG 05 2008  
AUG 05 2008  
MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT  
LOW

Dominick Giampaolo )  
Plaintiff )  
vs. ) Case No. 07 C 7154  
Terry McCann et. al. ) The Honorable Judge  
Defendants ) John W. Darrah Presiding

NOTICE OF FILING

To : Atty. Austin Franklin  
Asst Atty General  
100 West Randolph St, 13th Fl  
Chicago, IL 60601

PLEASE TAKE NOTICE that on July 31, 2008, the Plaintiff Dominick Giampaolo caused the following to be filed with the Clerk of the Court, US District Court, Chicago, IL, the following attached documents which are hereby served upon you;

RESPONSE TO DEFENDANTS MOTION TO DISMISS PLAINTIFFS COMPLAINT

  
Dominick Giampaolo

Dominick Giampaolo  
R04860  
Danville Corr. Ctr  
3820 East Main  
Danville, IL 61834

CERTIFICATE OF SERVICE

I, Dominick Giampaolo, a non-attorney, hereby certify that the proper number of the foregoing documents have been mailed to the parties named and listed above and to the Clerk of the Court, by placing them in the U.S. mail in envelopes with proper postage prepaid, located at the Danville C.C. in Danville, IL on July 31, 2008. This certificate being made under penalty of perjury pursuant to 28 USC 1746 and 18 USC 1621.

Signed this 31st day of July, 2008.

  
Dominick Giampaolo

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Dominick Giampaolo )  
Plaintiff )  
vs. )  
Terry McCann, et. al. )  
Defendants )

07cv7154  
Case No. 07 C 7154  
The Honorable Judge  
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RESPONSE TO DEFENDANTS MOTION TO DISMISS PLAINTIFFS COMPLAINT

NOW COMES the Plaintiff, Dominick Giampaolo, Pro-se, and in response to Defendants Motion to Dismiss states as follows;

INTRODUCTION

The Plaintiff files the following response while his Motion for Sanctions is still pending. Plaintiff hereby reserves the right to add to and/or refile depending on the outcome of that motion.

Defendants, through counsel, have brought claims that are not based in fact, cited authority with the deliberate intent to mislead the Plaintiff and this court, and made conclusory statements that have no place in a motion to dismiss. It does not surprise the Plaintiff that defense counsel has no regard for truth or proper procedure considering the improper tactics he has thus far used in this case.

Plaintiff will prove this court was proper in its 1915 ruling, that the Stateville personnel violated his constitutional rights, clearly established rights, and that they are not immune to money damages or liability in this claim.

RESPONSE TO ANALYSIS

The Defendants pleadings are rather confusing since they are based on conjecture and misquoted or applied case law. Plaintiff will attempt to reply using the same numerals and abbreviate the headings from the Defendants motion in order to help clarify this response.

I. UNRELATED CLAIMS

Plaintiff first must state for the record that any objection to the courts ruling should have been appealed within the proper timeframe. The time for appealing the decision is now past and time barred.

In the alternative and in the unlikely event that this objection is overlooked the Plaintiff states as follows;

A) The case of George v. Smith 507 F3d 605 (7th 2007) was decided on November 9, 2007. The mandate for that case would have issued on December 24, 2007. The Plaintiff filed his complaint on December 20, 2007. Therefore George, Id would not apply; If, in arguendo that is not applied Plaintiff states as follows;

B) This case is clearly a 'conditions of confinement case' in such a case the totality of the conditions must be considered. All the claims in this complaint would show the totality of the conditions. The court in Demallory v. Cullen, 855 F2d 422(7th 1998) states the court need look at all the conditions;

C) The Plaintiff was brought on court writs at the Stateville Corr. Ctr and while there the series of occurrences detailed in the complaint occurred which all have in common the laws of constitutional rights violations.

I. Unrelated Claims (Cont.)

C) (Cont.)...

Under Rule 20(a) states- "all persons...may be joined in one action as defendants if there is asserted against them jointly, severally, OR in the alternative, ANY right to relief in respect of OR arising out of the same transaction, occurrence, OR series of transactions OR occurrence and if any question of law OR fact common to all defendants will arise in the action"

D) Plaintiffs pleadings have the common fact that all Defendants are employed by the Illinois Department of Corrections (hereinafter "IDOC") at the Stateville Corr Ctr, all violated the Plaintiffs constitutional rights, and all work under the supervision of Warden Terry McCann.

E) Defendants claim that Plaintiff did this to save money is absurd, uneducated, and has no basis in fact. As Defendant points out in his mud slinging introduction the Plaintiff has MANY lawsuits with 3 active, including this one. Plaintiff at MOST regardless of how many lawsuits has deducted 20% of his previous months income. If Plaintiff had 1,000 lawsuits the % would not change, it is regulated by statute. Plaintiff attaches the last printout of the money owed these suits as Exhibit A. Plaintiff attaches his affidavit in support as Exhibit B.

Therefore the Defendants claims as to George v Smith, Id fail as a matter of fact and law for reasons stated herein.

II. FAILS TO STATE A CLAIM, PILLOW

Plaintiff would first like to point out that the Defendant does not raise the medical issues, see Pl. claim #1, had Plaintiff been properly treated and diagnosed the proper medication would have been available and the Plaintiff could have told the medical staff.

Plaintiff asked each of the Defendants named in claim #4 for a pillow and told them he was in pain due to his bad back, see attached affidavit Exhibit B. As in claim #1 they refused to contact any medical staff.

For a claim to be considered 'deliberately indifferent' there must be unnecessary and wanton infliction of pain. Among those are those that are totally without penological justification. Wilson v. Seiter, 501 US 294

The Defendants actions had no justifiable penological purpose. Pillows were available and yet they refused to give them to the Plaintiff.

The Defendants showed they refused to prevent or alleviate the harm Plaintiff was experiencing which shows deliberate indifference. Duane v. Lane, 959 F2d 673 (7th 1992)

The back pain is a sufficiently serious medical need that even a lay person would know needed treatment. It satisfies the objective component. The fact they disregarded Plaintiffs requests shows they wanted the Plaintiff to suffer harm, they disregarded the complaint. A prisoner need not show he was literally ignored, but Plaintiff was all but ignored. Greeno v. Dalet, 414 F3d 645 (7th 2005)

If Defendant had actually read the whole complaint they would know that the medical staff did not give Plaintiff even his prescription medication.

III. UNINTERRUPTED SLEEP

Defendant again seems to have not read the Plaintiffs complaint. The

III. Uninterrupted Sleep (Cont.)

The Defendants claim in the MOTion that Plaintiff plead facts that show the Defendants actions did not create an excessive risk to his health or safety.

This is completley false, see Pl. complaint #3, which states; "AS A DIRECT RESULT of officers Joseph, Egbe, Hawk, bush and Lts Douglass Nurse, Garby, and Jackson, and Franklin inactions to the noise continued day and night, I could barely sleep and my stress related conditions; ulcer, migraines, and IBS were aggravated causing severe pain and suffering thus violating my 8th amendment rights against cruela and unusual punishment"

That is a proper pleading. Again the totality of conditions must be considered. In claim #1, ignored by Defendants, the Plaintiff had a ruptured ear drum. Noise effects the pain level of ears.

Defendants reliance on Byrd v Brannigan is misplaced, (2000 WL 88689) in that case the Plaintiff provided no proof whatsoever to rebut defendants affidavits and the duration of the discomfort was only ½ hr NOT 28 days as in case at bar..

Defendants reliance on Mason v Shehan is even more misplaced (1993 WL 376218, ND Ill). That case states in relevant part;

"it is well established that prison conditions that 'deprive inmates of the minimal civilized measure of life's necessities' rise to the level of crueal and unusual punishment even if the conditions do NOT result from the intentional conduct of the prison officials." Williams needed "to prove that the conditions were so bad that they constituted cruel and unusual punishment. Allegations of severely unclean conditions have been found to state a claim for a violation of the 8th amendment. With respect to unclean conditions, Willliams allegations SURVIVE the motion to dismiss."

The noise in Mason, ID was 'occasional and minor' and the claim failed. The noise in case at bar was excessive and constant. The noise from the officers banging serves no legitimate penalogical purpose. Letting all the inmates shout and bang serves no purpose either.

As in Mason, id at 104. This argument is misplaced in a motion to dismiss because the sole question at this junction is whether relief is possible under ANY set of facts that could be established consistent with the allegations..

THE 7th circuit found in Antonelli v. Sheahan that 'noise occurred every night, often all night, interrupting or preenting his sleep' and concluded that the complaint states a claim under the 8th amendment. Antonelli v. Sheahan, 81 F3d 422 (&th 1996)

The court in Lewis v. Lane, 816 F2d 1165 (7th 1987) stated about bar-banging; "Thus is the prison administrators used an otherwise legitimate security measure in a manner designed to harras prisoners, the 8th amendment might be implicated." There the court remanded after the lower court summarily judged against the Plaintiff.

The case of Gutierrez v. Peters, 111 F3d 1364 is very dispositive to case at bar and will settle many issues;

"denial of pain medication as prescribed stated an 8th amendment claim (westlake v. Lucas, 537 F2d 857 reversing Rule 12(b)(6) where complaint allefed tht inmates requests for treatment of stomach pain and abdominal distress to bleeding ulcer were refused)"

"Jailers refused to give inmate ice packs or aspirin"

Plaintiffs claims of little or no sleep causing the medical problems are sufficient to state a claim.

#### IV. PERSONAL PROPERTY CLAIM

Once again Defendants seem to have not read the Plaintiffs complaint. The complaint #5 is not just a property issue. It is a cell conditions issue and as stated previously herein that alone states a viable claim for 8th amendment violation.

The Defendants think that 28 days without books or any distractions is a 'brief' period of time. Other inmates are on writs for over 6 months..

The equal protection argument raised therein is valid as the denial of the books, etc must serve some legitimate penological interest. It does not. No logic would conclude that 'writ guests' should be restricted more severely than a segregation inmate who has stabbed or killed an officer or inmate. Logic would conclude that such conditions would coerce an inmate to not want to be a writ guest and therefore abandon court claims or not attempt to go to court.

Defendants reliance on Robinson v. Ill State Corr Ctr (stateville) concerns the Segregation inmates, NOT those not in segregation. IT is actually supportive of Plaintiffs claims. Plaintiff has a right to not be punished by IDOC without due process and just cause. The Plaintiff broke no rules and yet had his property and other privileges taken from him. The Plaintiff can show these restrictions are based on impermissible factors..

The Defendants ignoring of the cell conditions issue is more than enough reason to deny dismissal on this issue.

#### V. 11TH AMENDMENT BAR

This claim made by defense counsel is deliberately misquoting the authorities he cites.

First the Plaintiff has sued the Defendants in their INDIVIDUAL and OFFICIAL capacities.

Second, Plaintiff is NOT suing the Illinois Department of Corrections directly.

In Sandville v. McCaughy, 266 F3d 724 (7th 2001) the court found "the guards' liability is not premised upon the acts or omissions of the medical professionals, it is premised upon their own deliberate indifference to Matts condition."

"Qualified immunity protects government officials from individual liability under section §1983 for actions taken while performing discretionary functions, UNLESS their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known."

The Plaintiff claims are all Constitutional violations are therefore defendants are NOT entitled to qualified immunity.

The reliance on Pennhurst v. Haldeman, 465 US 89 is also a misleading comment. that case clearly says;

"a suit challenging the constitutionality of a state official's actions is not one against the state." at 102

"sovereign immunity does not apply because an official who acts unconstitutionally is 'stripped of his official or representative character'"

Kroll v. Board of Trustees of Univ of Illinois states;

"Under an exception to the general rule however, official capacity actions may not be barred by the eleventh amendment insofar as the request prospective relief- i.e., an injunction or a declaratory judgment and monetary damages that are 'ancillary' to either."

V. 11TH AMENDMENT BAR

Thus for reasons stated herein the Defendants can not be barred from damages or liability.

CONCLUSION

The Defendant did not address the medical issues in Plaintiffs claim #1, the illegal strip search in claim #2, or the claim #6. The claims should be allowed to proceed.

The Plaintiff has shown facts sufficient to present a claim and thus the Motion to dismiss should be denied.

The Plaintiff asks this court to enter an order to deny Defendants Motion to Dismiss and for the costs of defending this motion. See attached exhibit B. The Plaintiff further asks for any other relief as this court deems fit and proper.

Respectfully Submitted,



Dominick Giampaolo

R04860

Plaintiff, Pro-se

Danville Corr. Ctr

3820 East Main

Danville, IL. 61834

VERIFICATION/DECLARATION

I, Dominick Giampaolo, a non-attorney, declare under oath and under penalty of perjury, that the statements set forth herein are true and correct to the best of my knowledge and belief. This declaration being made under 28 USC 1746 and 18 USC 1621 this 31st day of July, 2008.



Dominick Giampaolo

Date: 12/18/2007

Time: 1:21pm

d\_list\_furlough\_restitution

**Danville Correctional Center**  
**Trust Fund**  
**Furlough/Restitution Report**

REPORT CRITERIA - Inmate: R04860; New page for each inmate ? : No; Include Zero Balances ? : Yes; Furlough /  
 Restitution Type: 73 Court Ordered Fees; Report Type: Detail Line; Sort Order: Inmate Number; Status: All

Inmate	ID#	Vendor	Transaction Type	Date	Amount	Balance
R04860 Giampaolo, Dominick			73 Court Ordered Fees	08/10/2007	350.00	328.90
Housing Unit: DAN-01-A -56	5634	1766 U.S. District Court : Clerk				
		Detailed History:	1 Beginning Balance	08/10/2007	350.00	350.00
			6 Lump Sum Payment	08/10/2007	11.10	338.90
			3 Payment	08/17/2007	2.00	336.90
			3 Payment	09/13/2007	2.00	334.90
			3 Payment	10/12/2007	2.00	332.90
			3 Payment	11/16/2007	2.00	330.90
			3 Payment	12/13/2007	2.00	328.90
Payment Instructions: 20.00 % with 0.00 minimum balance.						
R04860 Giampaolo, Dominick			73 Court Ordered Fees	08/28/2007	187.50	179.50
Housing Unit: DAN-01-A -56	5649	5424 Clerk, United States District Co				
		Detailed History:	1 Beginning Balance	08/28/2007	187.50	187.50
			3 Payment	09/13/2007	2.00	185.50
			3 Payment	10/12/2007	2.00	183.50
			3 Payment	11/16/2007	2.00	181.50
			3 Payment	12/13/2007	2.00	179.50
Payment Instructions: 20.00 % with 0.00 minimum balance.						
R04860 Giampaolo, Dominick			73 Court Ordered Fees	08/28/2007	346.19	338.19
Housing Unit: DAN-01-A -56	5650	1439 U.S. District Court:Clerk				
		Detailed History:	1 Beginning Balance	08/28/2007	346.19	346.19
			3 Payment	09/13/2007	2.00	344.19
			3 Payment	10/12/2007	2.00	342.19
			3 Payment	11/16/2007	2.00	340.19
			3 Payment	12/13/2007	2.00	338.19
Payment Instructions: 20.00 % with 0.00 minimum balance.						
R04860 Giampaolo, Dominick			73 Court Ordered Fees	08/28/2007	345.40	338.01
Housing Unit: DAN-01-A -56	5651	1439 U.S. District Court:Clerk				
		Detailed History:	1 Beginning Balance	08/28/2007	345.40	345.40
			3 Payment	09/13/2007	2.00	343.40
			3 Payment	10/12/2007	2.00	341.40
			3 Payment	11/16/2007	1.39	340.01
			3 Payment	12/13/2007	2.00	338.01
Payment Instructions: 20.00 % with 0.00 minimum balance.						
Final Total					1,184.60	

EXHIBIT B


AFFIDAVIT OF DOMINICK GIAMPAOLO

I, Dominick Giampaolo, being competent to make this declaration state the following to be true and correct to the best of my knowledge and belief;

1. That I am the maker of this affidavit.
2. That I did not put multiple claims in the lawsuit to save money.
3. That I told all the officers listed in claim #4 that I had a bad back and needed a pillow.
4. That the cost of copies/ mail to defend this motion was appx. \$35.

I make this affidavit and declaration under oath and penalty of perjury pursuant to 28 USC 1746 and 18 USC 1621.

Signed this 27th day of July, 2008

  
Dominick Giampaolo  
R04860  
Danville Corr Ctr  
3820 East Main  
Danville, IL. 61834